FENGHUA DEVELOPMENT SDN BHD

v.

ASIA COMMERCIAL FINANCE (M) BHD; AIK AIK HOLDINGS SDN BHD (THIRD PARTY)

HIGH COURT MALAYA, IPOH
CLEMENT SKINNER JC
[CIVIL SUIT NO: 22-251-92]
9 JULY 1999

CIVIL PROCEDURE: *Want of prosecution - Striking out - Delay in setting down action for trial - Date stated in order on summons for directions to set action down for trial lapsed by two months - Whether a complete, total or wholesale disregard of rules - Whether an abuse of process - Whether action ought to be struck out*

CIVIL PROCEDURE: *Want of prosecution - Striking out - Inordinate delay - What amounts to inordinate delay - Whether two month delay in setting down action for trial justifies striking out - Whether proof that delay inordinate sufficient - Whether still necessary to show prejudice or risk of unfair trial - What amounts to prejudice - Whether fact that suit hanging over head sufficient to show prejudice - Difficulty in locating witnesses and fear of failing memories - What must be shown for court to consider these as prejudices*

CIVIL PROCEDURE: *Want of prosecution - Delay in prosecuting action - Appeal against dismissal of earlier application to strike out still pending - No stay of proceedings ordered - Whether plaintiff may await outcome of appeal - Whether failure to prosecute action pending appeal amounts to want of prosecution - Whether action ought to be struck out*

CIVIL PROCEDURE: *Summons for directions - Non-compliance with order on summons for directions - Whether amounts to intentional and contumelious conduct - Whether orders made on directions are peremptory or "unless orders" - Whether action ought to be struck out*

CIVIL PROCEDURE: *Want of prosecution - Striking out - Inordinate delay involving complete, total or wholesale disregard of rules of court amounting to abuse of process - Whether such abuse a ground for striking out without having to show prejudice - Whether a new limb to striking out for want of prosecution - Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Anor v. Lee Boon Tin*

The plaintiff's writ and statement of claim was struck out for want of prosecution by the deputy registrar and this was the ensuing appeal. The facts leading to this appeal are as follows. Upon taking out a summons for directions, the plaintiff and the defendant were ordered to serve on each other a list of their respective documents by a specified period and thereafter the plaintiff was to set the action down for trial within a specified period. Neither the plaintiff nor the defendant served on the other a list of documents as ordered and the plaintiff failed to set the action down for trial within the period specified. Two months after the last date for setting down the action for trial, the defendant successfully applied to the deputy registrar to strike out the plaintiff's action on two grounds, namely, the plaintiff had delayed in prosecuting the action since it was filed in 1992 and the plaintiff's failure to comply with the orders made on directions.

In support of the first ground, the defendant contended that upon the dismissal of its earlier application to strike out the plaintiff's action on different grounds ('the other striking out application'), the plaintiff had delayed by some 22 months before giving the defendant notice of intention to proceed with the action. The decision dismissing the other striking out application was unsuccessfully taken to the Supreme Court on appeal, and the appeal took some 19 months to be disposed of. In spite of this, the defendant contended that since no stay of proceedings had been ordered when it pursued the appeal, the plaintiff should have proceeded to prosecute the action.

As to the plaintiff's failure to comply with the orders made on directions, the defendant submitted: (i) that this amounted to an intentional and contumelious default; (ii) that there was inordinate and inexcusable delay for which no explanation had been given thereby causing prejudice to the defendant in that its name would be tarnished by this action hanging over its head; and (iii) that it amounted to an inordinate and inexcusable delay involving complete, total or wholesale disregard of the rules of court amounting to an abuse of process which will itself constitute a ground for striking out without the need to show prejudice.

Held:

[1] The plaintiff was faced with the prospect of its action being dismissed if the defendant's appeal against the dismissal of the other striking out application was successful. Therefore, to require that the plaintiff should nevertheless continue to prosecute its claim thereby incurring further costs and putting in effort which may finally turn out to be a waste, is to insist upon an unusually strict and impractical adherence to the rules which on the particular facts of this case is unwarranted. The plaintiff, being faced with such a prospect, was entitled to adopt a practical approach and await the outcome of the appeal.

[2] The orders made on directions were not peremptory or "unless orders" and neither was this a case where the court had called on the plaintiff to show cause under O. 34 r. 8(2) of the Rules of the High Court 1980. Therefore, the plaintiff's conduct cannot be said to be intentional and contumelious.

[3] Whether a period of delay is or is not inordinate is a question of fact to be decided on the facts of each particular case. An indication of what the profession and the courts regard as an unacceptable period may be gleaned from looking at like cases to see what length of delay has prompted the courts to strike out actions. Although courts are becoming less tolerant of delay, the two month delay in this case cannot be described as inordinate. Consequently, the fact that the plaintiff has not sworn an affidavit-in-reply to explain the delay is not fatal.

[4] Even if it can be said that the delay of two months is inordinate and inexcusable, the defendant must still show that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or have caused serious prejudice to the defendants.

[4a] The bringing of actions against financial institutions is not uncommon and in the absence of a positive assertion or any substantiating evidence, such as for example that this action has received wide coverage in the press, the defendant's allegation that its name is prejudiced remains a bare one and insufficient to establish prejudice.

[4b] There was no positive assertion or any evidence to show how much more expenditure the defendant had to incur by the two month delay or what extra amount of time they have had to put into this litigation as a result of the two month delay. The facts and evidence pertaining to the prejudice allegedly suffered by the defendant are matters wholly within their knowledge and it is for them to raise and substantiate which they had not done.

[4c] Difficulty in locating witnesses and the fear of failing memories would merit consideration as prejudices if the court is informed of: (i) the issues on which witness evidence is vital; (ii) the relevant witnesses are identified and the role they play in relation to those issues is explained; and (iii) the reason for the difficulty in locating those witnesses is given.

[5] What the plaintiff omitted to do cannot be categorised as a complete, total or wholesale disregard of the rules. Further, it is not open to the defendant to accuse the plaintiff of complete, total or wholesale disregard of the rules when the defendant is equally guilty of disregard of the

rules in having filed a defence out of time without the leave of court and in not having served its list of documents as required by the orders made on directions.

[Appeal allowed.]

Case(s) referred to:

Arbuthnot Latham Bank Ltd v. Trafalgar Holdings Ltd & Ors (The Times Law Reports, 29 December 1997) 698 ***(refd)***
Bank Bumiputra Malaysia Bhd & Anor v. Lorrain Esme Osman [1990] 2 CLJ 462 ***(foll)***
Bernard Chai v. Klang Port Authority [1999] 5 CLJ 481 ***(foll)***
Birkett v. James [1977] 2 All ER 801 ***(refd)***
Choraria v. Sethia (The Times Law Report, 29 January 1998) 43 ***(refd)***
Confidence Concrete Sdn Bhd v. Shimizu-Peremba Sdn Bhd [1994] 3 CLJ 300 ***(refd)***
Cold Storage Singapore [1983] Pte Ltd v. Management Corp of Chancery Court [1992] 1 SLR 521 ***(refd)***
Datuk Samy Vellu v. Karpal Singh [1989] 3 MLJ 495 ***(refd)***
Kuala Lumpur Finance Bhd v. Yau Jiok Hua, KL Civil Suit No D423-1604-88 ***(refd)***
Lee Chong Ah v. Cheong Chee & Ors [1994] 3 CLJ 59 ***(refd)***
Leong Seng Kiat v. Law Peng Guan & Ors [1992] 2 CLJ 825 ***(refd)***
Negara Properties Sdn Bhd v. Akitek Bersekutu Malaysia [1996] 2 CLJ 923 ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***
Public Finance Bhd v. Natcom Development Sdn Bhd & Ors [1996] 4 CLJ 291 ***(refd)***
R Rajasingam v. Balwant Singh Purba [1996] 3 CLJ 222 ***(refd)***
Toh Hock Thye v. Toh Chwee Biow [1982] 1 MLJ 152 ***(refd)***
Trustees of Leong San Tong Khoo Kongsi (Penang) Registered v. Lee Boon Tin [1998] 4 CLJ 368 ***(dist)***
Vasudevan v. T Damoderan & Anor [1981] 2 MLJ 150 ***(refd)***
Yong Beng Credit Sdn Bhd v. Tia Chong King t/a Polysan Co [1993] 4 CLJ 502 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 34 rr. 2(2), 8(1), (2), O. 43 r. 8(2)

For the plaintiff - Lee Yen Lyn; M/s Chan & Assocs
For the defendant - Rajvinder Singh; M/s Sidek, Teoh, Wong & Dennis

Reported by S Dharmendran

JUDGMENT

Clement Skinner JC:

This is an appeal brought by the plaintiff against the decision of the deputy registrar given on 30 December 1998, striking out the plaintiff's writ and statement of claim for want of prosecution.

On 22 April 1998, on a summons for directions taken out by the plaintiff, the deputy registrar ordered: that the plaintiff within 30 days serve on the defendant a list of documents verified by affidavit that the defendant serve on the plaintiff a list of their documents verified by affidavit within 30 days; that the plaintiff then set the action down for trial within 30 days thereafter.

In submissions, counsel for the plaintiff worked out the relevant dates for compliance as follows: the plaintiff should have served their list of documents on or before 21 May 1998, whereafter the defendant should have served their list on or before 20 June 1998, and the action set down for trial by 19 July 1998. Counsel for the defendant does not dispute the above dates.

Both the plaintiff and defendant failed to comply with the direction to serve their respective list of documents but when the plaintiff failed to set the action down for trial as required, the defendant on 19 September 1998 filed an application to strike out the action for want of prosecution under O. 34 r. 2(2) and r. 8(1) Rules of the High Court 1980 (RHC) and or under the inherent jurisdiction of the court. Accordingly, it is not in dispute that at the date of filing of the defendant's strike out application, there had been a delay of two months to set the action down for trial.

The grounds relied upon by the defendants in bringing its strike out application are:

(a) there has been a delay in prosecuting this action since it was filed in 1992;

(b) the plaintiff has failed to file a list of documents verified by affidavit within the time stated in the order for directions of 22 April 1998;

(c) the plaintiff has failed to set the action down for trial in accordance with the order made on 22 April 1998.

Has There Been Delay Since 1992?

It is the submission of counsel for the defendant that it is seven years since this action was commenced in 1992 but the action has not been set down for trial. During which time there was a period of some 22 months when the plaintiff remained inactive. Counsel identified these 22 months as being that period between 18 December 1995 when an application made by the defendant to dismiss the suit on grounds of limitation was disallowed, and October 1997 when the plaintiff gave notice of intention to proceed with this action.

The chronology of events in this case as traced by the deputy registrar shows that the action was commenced in 1992, and that on being served, the defendant entered a conditional appearance and thereafter applied to strike out the suit on the grounds of *res judicata* (the 1st strike out application) which

was only disposed of on 5 February 1994 when it was dismissed. Thereafter, as observed by the deputy registrar, about a year after the 1st strike out application was dismissed, the defendant on 25 February 1995 filed a defence without having obtained any leave to do so. Then, in April 1995, the defendant filed another application to dismiss the action on the grounds of limitation (the 2nd strike out application) which was dismissed on 18 December 1995, whereafter the defendant appealed against that decision to the Supreme Court which appeal was disposed of on 15 July 1997. The plaintiff then gave notice of intention to proceed on 10 October 1997.

The above chronology shows that the defendant's attempt to characterise the passing of seven years since the action was commenced as a period of delay to be incorrect. If anything, it would not be an unfair observation to say that the litigation has become protracted and seven years have elapsed since the filing of the action mainly due to the defendant's 1st and 2nd strike out applications.

With regard to the period of 22 months alleged inactivity by the plaintiff, counsel for the defendant submitted that during that period when the defendant was pursuing its appeal against the 2nd strike out decision, no proceedings had been ordered and so the plaintiff should have got on with its action. I regret I am unable to accept this submission. The plaintiff was faced with the prospect of its action being dismissed if the defendant's appeal was successful: to require that the plaintiff should nevertheless continue incurring further costs and effort which may finally turn out to be a waste is to insist upon an unusually strict and impractical adherence to the rules which on the particular facts of this case is unwarranted. In my judgment, the plaintiff on being faced with such a prospect was entitled to adopt a practical approach and await the outcome of the appeal and in having done so cannot be faulted or accused of delay. I find support for what I have said in the decision of Zakaria Yatim J, (as he then was) in the case of *Bank Bumiputra Malaysia Bhd & Anor v. Lorrain Esme Osman* [1990] 2 CLJ 462; [1990] 3 MLJ 481, where the defendant attempted to set aside certain mareva injunctions obtained against him on grounds, *inter alia*, that the plaintiff had not diligently prosecuted its action and had only set down the action for trial after a pending appeal had been withdrawn by the defendant. To this complaint, Zakaria Yatim J, held that pending the disposal of the appeal, it would not have been practical to set the action down for trial.

I accordingly reject the defendant's complaint that there has been delay in the prosecution of this action after it was filed in 1992.

Consequence Of Failure To Comply With Order Made On Directions

The next two grounds relied upon by the defendant will be considered together. Counsel for the defendant took a three pronged attack on the failure of the plaintiff to comply with the order for directions. It was firstly said that such failure amounted to intentional and contumelious default. Secondly, it was said that there was inordinate and inexcusable delay for which no explanation has been given and which has caused prejudice to the defendant. Thirdly, it was said the failure constituted an abuse of process for which the action should be struck out.

The principles of law upon which a court will act in dismissing an action for want of prosecution, as expounded by Lord Diplock in the case of *Birkett v. James* [1977] 2 All ER 801, have been accepted and applied by our highest courts since the Federal Court case of *Vasudevan v. T Damoderan & Anor* [1981] 2 MLJ 150. This is what Lord Diplock, said at p. 805 of his speech in *Birkett and James*:

> The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyer, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

With the above principles in mind, I turn to consider the submissions of the parties.

In reply to the submission that there has been intentional and contumelious default, counsel for the plaintiff whilst admitting to non-compliance, denies that on the facts of this case, the plaintiff's conduct can be said to be intentional and contumelious because the orders made on the summons for directions are not peremptory orders. Counsel cited *Bernard Chai v. Klang Port Authority* [1999] 5 CLJ 481; [1999] 1 MLJ 650 in support of this submission. Therefore, submits counsel, non-compliance *per se* with the orders made does not give rise to an inference that the default is intentional and contumelious so as to warrant a striking out. Counsel also points out that ours is not a case where the court has acted under its own powers pursuant to O. 34 r. 8(2) RHC to call upon the plaintiff to show cause why this case should not be struck out, which if it were the case and the plaintiff had refused to show cause or deliberately remained silent, it would be open to infer that the plaintiff's conduct was intentional and contumelious, as for example was the case in *Toh Hock*

Thye v. Toh Chwee Biow [1982] 1 MLJ 152 a case relied upon by the defendant. I find there is merit in this submission of counsel for the plaintiff. In my judgment, the orders made on hearing of the summons for directions on 22 April 1998, were not peremptory or "unless orders" and neither was this a case where the court had called on the plaintiff to show cause under O. 34 r. 8(2) RHC. In addition to the above the defendant has not been able to show and neither have I been able to detect any other conduct on the part of the plaintiff which might be characterised as intentional and contumelious.

With reference to the second complaint on inordinate and inexcusable delay, it is the submission of counsel for the plaintiff that the delay, if any, in failing to set this case down for trial is only of two months and such delay cannot be regarded as inordinate. In any event, submits counsel, even if it can be said that the two month delay is inordinate and because no explanation has been given for it the delay is to be regarded as inexcusable, to attract the draconian sanction of a striking out the defendant must still show that a fair trial is not possible as a result of such delay or the defendant has suffered serious prejudice. This the defendant has failed to do.

Counsel for the defendant on the other hand says a period of two months delay is inordinate and is also to be regarded as inexcusable in this case as the plaintiff has not sworn an affidavit to explain the delay.

Whether a period of delay is or not inordinate is a question of fact, to be decided on the facts of each particular case. The question then is, can a delay of two months be described as inordinate? *Leong Seng Kiat v. Law Peng Guan & Ors* [1992] 2 CLJ 825 at p. 827, the expression "inordinate" was described as meaning "materially longer than the time usually regarded by the profession and courts as an acceptable period." An indication of what the profession and the courts regard as an acceptable, or rather not acceptable, period may be gleaned from looking at like cases to see what length of delay has prompted the court to strike out an action. All the cases mentioned below resulted in their being struck out for inordinate delay in complying with an order for directions:

(i) In *Datuk Samy Vellu v. Karpal Singh* [1989] 3 MLJ 495, there was a delay of some six years from the filing of list of documents pursuant to the order for direction whereafter the action went to sleep and the date of the strike out application;

(ii) In *Yong Beng Credit Sdn Bhd v. Tia Chong King @ Tay Chong Keng t/a Polysan Co* [1993] 4 CLJ 502, there was a delay of one year three months from the order made on summons for directions to set down the action for trial to the date when it was set down;

(iii) In *Confidence Concrete Sdn Bhd v. Shimizu-Peremba Sdn Bhd* [1994] 3 CLJ 300; [1994] 1 MLJ 465, there was a delay of four years between the date the order was made for setting down for trial on a summons for direction and the date the strike out application was filed;

(iv) In *Lee Chong Ah @ Lee Chong At v. Cheong Chee @ Hang & Ors* [1994] 3 CLJ 59, there was a six and a half years delay between the order for direction to set the case down for trial and the strike out application;

(v) In *Kuala Lumpur Finance Bhd v. Yau Jiok Hua*, KL Civil Suit No. D423 - 1604 - 88, there was a delay of one year nine months between the order made on summons for direction and the date the plaintiff served notice of intention to proceed;

(vi) In *Nagara Properties Sdn Bhd v. Akitek Bersekutu Malaysia* [1996] 2 CLJ 923; [1995] 2 MLJ 185, there was a delay of some three years between the date when on a summons for direction list of documents was to be served and when the list was actually served;

(vii) In *R Rajasingam v. Balwant Singh Purba* [1996] 3 CLJ 222; [1996] 2 MLJ 549, there was a delay of six and a half months in filing the plaintiffs list of documents pursuant to the order of directions but this had been preceeded by a delay of six years.

Whilst the above cases show that the courts are getting less tolerant with delay, and the *R Rajasingam* case regarded six and half months as inordinate, in my considered view, the period of two months delay in this case cannot be described as inordinate. As a consequence of this finding, the fact that the plaintiff has not sworn an affidavit in reply to explain the delay is not fatal nor would it advance the defendant's case on this ground. Even if it can be said that the delay of two months is inordinate and inexcusable, the defendant must still show, in accordance with the second limb of the principle in *Birkett v. James,* that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or have caused serious prejudice to the defendants.

The defendant's complaint regarding the prejudice it has suffered as a result of the plaintiff's delay is fully set out in two paragraphs of the affidavit of Lee Yoke Meng @ Lee Yim Meng sworn on 16 September 1998 in support of the defendant's application. Paragraph 15 states that the delay is intentional and has caused great risk to the defendant whereby the defendant has been seriously prejudiced and para. 15.1 states that the defendant is a well known finance company in Malaysia and the delay in prosecution of the action has prejudiced the defendant in name, time and expense.

In my judgment, the above paragraphs of the defendant's affidavit do no more than make bare allegations and are insufficient to discharge the burden on the defendant of showing prejudice. To me, the bringing of actions against financial institutions is not uncommon and in the absence of a positive assertion or any substantiating evidence brought forth in the affidavit of the defendant, such as for example that this litigation has received wide coverage in the press, the defendant's allegation that its name is prejudiced remains a bare one and in my view insufficient to establish prejudice. Similarly, there is no positive assertion or any evidence in the defendant's affidavit to show how much more expenditure the defendant has had to incur by the two month delay or what extra amount of time they have had to put into this litigation as a result of the two month delay. The facts and evidence pertaining to the prejudice allegedly suffered by the defendant are matters wholly within their knowledge and it is for them to make good and substantiate which they have not done. Consequently, it is my view that the principle stated in *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] MLJ p. 281 that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted would not apply to the facts of this case because there is no such positive assertion so that the omission of the plaintiff to file an affidavit to refute or contradict the allegations do not give rise to any inference that the plaintiff admits the truth of the allegations nor does it mean that the court ought to accept the allegations as evidence of prejudice. See *Cold Storage Singapore (1983) Pte Ltd v. Management Corp. of Chancery Court* [1992] 1 SLR 521.

To make up for the evidential deficiency in the defendant's affidavit, counsel for the defendant stated in submissions that because of the delay there will be difficulty in locating witnesses, that there will be failure in memory of witnesses, that with the suit hanging over the defendant's head its reputation will be affected. In considering these submissions, I find that in the first place they are an attempt to put evidence before the court and as such should rightly be made by affidavit and not made by counsel in chambers. Secondly, even if counsel should be allowed to make these submissions because a general statement about prejudice had been made in the defendant's affidavit, these submissions of counsel regarding the alleged difficulty in locating witnesses and fear for their failing memories would have merited consideration if the defendant had first identified for the court the issues on which witness evidence is vital and then identified who the relevant witnesses are and what role they played in relation to those issues and why those witnesses cannot now be located. The defendant not having first established the necessity for such witnesses I cannot attach much weight to the submissions made. As regards the submission that with the case hanging over the head of the defendant its reputation would be affected, I find it to be but another version of the earlier

submission on the defendant's name being prejudiced and what I said earlier on that matter applies equally here. In the circumstances and for the reasons given above, I find the defendant's allegation that they have suffered prejudice as a result of the two months delay not made out.

It was lastly argued by counsel for the defendant that following the recent decision of the Court of Appeal in *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered v. Lee Boon Tin* [1998] 4 CLJ 368; [1998] 4 MLJ 373, it is recognised that in addition to the two limbs of the principle stated in *Birkett v. James*, there is now available a new limb for striking out for want of prosecution, namely, inordinate and inexcusable delay involving complete, total or wholesale disregard of the rules of court amounting to an abuse of process which will itself constitute a ground for striking out without the need to show prejudice.

In the above case, Mokhtar Sidin JCA, referred to two decisions of the English Court of Appeal on case flow management. The first was the case of *Arbuthnot Latham Bank Ltd v. Trafalgar Holdings Ltd & Others, the Times Law Reports,* 29 December 1997 at p. 698, from which case, his lordship quoted approvingly what Lord Woolf MR said about the necessity for litigants and their legal advisers to observe the rules and time limits set by the court in progressing litigation within reasonable time with the pending changes to be made in England to their rules of court and which have now already come into effect. This is what Lord Woolf MR said:

> The existing rules contained time limits which were designed to achieve the disposal of litigation within a reasonable time scale. Those rules should be observed.

He also said

> The change in culture which was already taking place would enable courts to recognize for the future, more readily than theretofore, that a wholesale disregard of the rules was an abuse of process.
>
> *While an abuse of process could be within the first category identified in Birkett v. James, it was also a separate ground for striking out or staying an action, which did not depend on the need to show prejudice to the defendant or that a fair trial was no longer possible.* (emphasis added.)

The second was the case of *Choraria v. Sethia,* The Times Law Report, 29 January 1998, at p. 43 in which Nourse LJ stated what he found the law to be on delay in the context of striking out for want of prosecution in the following terms:

> The law, as it is applied to this case could therefore be stated thus; Although inordinate and inexcusable delay alone, however great, did not amount to an abuse of process, delay which involved complete total or wholesale disregard, put it how you will, of the rules of court with full awareness of the consequences, was capable of amounting to such an abuse, so that, if it was fair to do so, the action would be struck out or dismissed on that ground. That was the principle on which the court had now to act. Whether it was identified as being comprehended within the first limb of *Birkett v James* or as one having an independent existence appeared to be a point of no importance.

Having considered the two English Court of Appeal decisions, this is what Mokhtar Sidin JCA said at p. 385:

> From our observation, it is clear to us that from the two cases, there emerged an additional limb to strike out a plaintiff's claim. The original two limbs had been laid down in *Birkett v. James*. We are not sure whether it is an offshoot of the second limb or it is a third limb. Be that as it may, this limb is important in view of the recent development in respect of case flow management. This new development is to overcome the backlog of cases now existing in courts in England. This new limb as we understand it to be from the 2 cases is that where there is inordinate and inexcusable delay which involves complete, total or wholesale disregard of the rules of the court with full awareness of the consequences is capable of amounting to such an abuse so that if it is fair to do so, the action will be struck out or dismissed on that ground. From the decisions too, it appears to us that there is no necessity to show prejudice in such cases.
>
> There is no denial that in this country we have backlog of cases due to unnecessary delay. In fact, in some courts, the learned judge had taken the initiative to introduce case flow management in order to hasten the hearing of actions brought before his court. The importance of case flow management is for the parties to observe the time limits as provided by the law so that the action could be brought to trial within time. It is true that some parties had caused unnecessary delay due to non-observance of the time schedule provided by the Rules. We have amended certain provisions in the rules of the High Court 1980 whereby time limits are given such as filing of affidavits. Our courts are definitely moving towards this case flow management era. As such, we see no reason why we should not adopt the principles stated in those two decisions.

Relying on the above decision of the Court of Appeal in the *Trustee of Leong San Tong Khoo Kongsi* case, counsel for the defendant submitted that the failure of the plaintiffs to file their list of documents and set the action down for trial amounted to complete, total or wholesale disregard for the rules of court which amounts to an abuse of process for which this action should be struck out without the defendants having to show prejudice.

I welcome the development in our law in this area made by the Court of Appeal in the *Trustees of Leong San Tong Khoo Kongsi*. However, insofar as the submission of counsel for the defendant is concerned, I regret I do not find that I can characterise what the plaintiff has omitted to do as complete, total or wholesale disregard for the rules. It is clear from a reading of the *Khoo Kongsi* case that the plaintiff there had been guilty of both pre-filing delay of some five years 11 months and had come to court just one month before the limitation period had set in. That was followed by post-filing delay of one year nine months when the plaintiff delayed in filing its application for directions. There then followed total inaction when the plaintiff let the action go to sleep and took no steps to have their summons for directions called on or fixed for hearing and it was the court that had to wake the plaintiff up by issuing a show cause notice. There are no similar features in our case. I also wish to say that insofar as the question of abusing the process of court is concerned, it does not lie in the mouth of the defendant to accuse the plaintiff of complete, total or wholesale disregard for the rules when the defendant's themselves are equally guilty of disregard of the rules in having filed a defence out of time without the leave of court, as observed by the deputy registrar, and in not having served their list of documents as required by the order made on directions.

In concluding I also wish to make it clear that I have not overlooked the clear statements emanating from our higher courts that "the courts are no longer prepared to tolerate the long delays with which the law has been associated. These days trial courts are anxious to clear the business assigned to them. All others who are concerned in the administration of civil justice should ensure that the courts are not unnecessarily burdened with litigation which it is not intended to be prosecuted in earnest," see *Public Finance Bhd v. Natcom Development Sdn Bhd & Ors* [1996] 4 CLJ 291; [1996] 2 MLJ 657. I have however not found this case to be one that offends against the above statement.

In the circumstances, I allow the plaintiff's appeal with costs and set aside the order of the deputy registrar. I also order the plaintiff to serve their list of documents verified by affidavit within 30 days from the date hereof whereafter the plaintiff is to set this action down for trial within 60 days hereof failing which the plaintiff will be liable to show cause why this action should not be struck out under O. 34 r. 8(2) RHC.